View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Brigham Young University Law School

Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1969

State Farm Mutual Insurance Company v. Farmers Insurance Exchange : Brief of Appellant

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Hanson & Garrett; Attorneys for Appellant

Recommended Citation

Brief of Appellant, *State Farm v. Farmers Insurance*, No. 11350 (1969).
https://digitalcommons.law.byu.edu/uofu_sc2/3483

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME CO
OF THE
STATE OF UTA

TATE FARM MUTUAL
NSURANCE COMPANY,
Plaintiff and

vs.

ARMERS INSURA
CHANGE,
Defe

vs

ARL R. SESSIONS,
Third

BRIEF

Appeal
Third District
Honorable

ONG & HANNI
Boston Building
lt Lake City, Utah 84111
Attorneys for Respo

INDEX

CASES CITED

INDEX (Continued)

INDEX (Continued)

STATUTES CITED

TEXTS CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE FARM MUTUAL INSURANCE COMPANY,
Plaintiff and Respondent,

vs.

FARMERS INSURANCE EXCHANGE,
Defendant and Third-Party Plaintiff, and Appellant,

vs

CARL R. SESSIONS,
Third-Party Denfendant

Case No. 11350

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF CASE

This is an action brought by the plaintiff and respondent, State Farm Mutual Insurance Company, to recover from the defendant, Farmers Insurance Exchange, the amount of $676.18 under an alleged right of subrogation arising from the payment of medical expenses to the plaintiff's insured under the provisions of the plaintiff's policy of insurance. Defendant contends that there is no such right of subrogation in the State of Utah, and secondly that even if there is the plaintiff herein did not give sufficient notice to the defendant of its subrogation

interest and therefore is precluded from making recovery from the defendant.

DISPOSITION IN THE LOWER COURT

After defendant's motion to dismiss had been denied the plaintiff filed a motion for summary judgment which was granted awarding to the plaintiff the amount of $676.18, interest, and costs of court.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have this Court reverse the lower court's summary judgment in plaintiff's favor and dismiss plaintiff's actions on the grounds that as a matter of law there exists no such right of subrogation. If, however, this Court holds that there is such a right of subrogation defendant requests the Court to remand the case to the lower court to determine the factual question of whether defendant had sufficient notice of plaintiff's right of subrogation.

STATEMENT OF FACTS

The facts here are essentially without dispute. On June 27, 1967, at the Geneva Steel parking lot in Utah County, one Doyle Sweat backed his 1956 Chevrolet truck into a 1967 Buick Riviera owned and occupied at said time by Carl R. Sessions resulting in property damage and personal injuries to Carl R. Session.

At the time of said accident, Carl R. Sessions was an insured under an automobile liability policy issued by the plaintiff, State Farm Mutual Insurance Company, which policy of insurance contained a coverage known as Medical Pay Coverage, under which State Farm was required to pay up to $1,000 for medical expenses incurred by Carl R. Sessions, which in said accident amounted to $676.18. Said policy of insurance provided that the insurer, State Farm, would be subrogated against the third party tort feasor for the amounts paid under said medical pay coverage, and said policy in addition provided that the insured should execute and deliver instruments and do whatever necessary to secure such subrogation rights for the insurer and that the insured should do nothing after the loss to prejudice such subrogation rights. On the other hand Doyle Sweat was on said date insured under an automobile liability policy issued by defendant, Farmers Insurance Exchange, covering him for any liability arising from said accident.

On August 4, 1967, respondent through its Senior Field Claims Representative, Martin Young, wrote a letter to the appellant which stated as follows:

> "We have been informed that you are the insurance carrier for the party designated as your insured in the caption of this letter.
>
> "Our investigation establishes that your insured was responsible for this accident. The

purpose of this letter is to inform you that we have collision and medical payments coverage on the above policy, both being written on a subrogation basis.

"While we have not been called upon to make payment under these coverages we wish to go on record of our possible interest and ask that you proceed accordingly.

"We wish to thank you for your cooperation and if we can assist you in any way please advise.

Yours very truly,

Martin Young"

On the same day Martin Young mailed drafts for Sessions's medical expenses of $676.18. (Exhibit P-1)

Five days later on August 9, 1967, defendant Farmers in behalf of its insured Doyle Sweat entered into a settlement with said Carl R. Sessions for any and all claims he may have against Sweat and Farmers arising from said accident, paying him $4,127.87 and receiving from Sessions a full and general release.

Subsequent to said settlement State Farm made demand upon defendant Farmers for reimbursement of said amount, which Farmers denied in a letter dated October 19, 1967. State Farm then filed the present action seeking to recover $676.18 under its alleges subrogation rights. Defendant Farmers filed a motion to dismiss the action on the ground

that a cause of action had not been stated, in particular that as a matter of law no right of subrogation of medical expenses exists in the State of Utah, and that in addition respondent's insured Sessions was a necessary party to said action inasmuch as he totally released appellant from any further liability to defendant or its insured. The lower court denied the motion, and appellant filed its answer. Appellant then on leave of court filed a third party complaint against Carl R. Sessions alleging that if anyone was liable to State Farm it was Sessions since he recovered his medical expenses twice and executed a full and complete release to appellant. Service was not accomplished on Sessions inasmuch as he had moved to Montana. Respondent then filed a motion for summary judgment without affidavit or other evidence offered. At the hearing of said motion appellant denied plaintiff's right of subrogation and questioned the adequacy of respondent's notice of August 4, 1967 (Exhibit D-2) and raised the issue of whether payment of said medical expenses had been made prior to appellant's settlement with Sessions in response to which State Farm offered in evidence Exhibit P-1 showing payments of the medical expenses on August 4, 1967. After hearing counsels' argument and reviewing the Memorandums of Law filed previously in defendant's motion to dismiss, the court granted plaintiff's motion for summary judgment holding that as a matter of law respondent had a right to subrogate against the de-

fendant on the medical expense payments and that the notice of August 4 constituted adequate notice.

Appellant takes issue with both holdings.

ARGUMENT

POINT I

THE LOWER COURT IN FINDING THAT AS A MATTER OF LAW A RIGHT OF SUBROGATION EXISTS IN BEHALF OF PLAINTIFF STATE FARM FOR MEDICAL PAYMENTS ERRED INASMUCH AS SAID SUBROGATION VIOLATES PUBLIC POLICY AND IS AGAINST THE LAW AS AN ASSIGNMENT OF AN ACTION FOR PERSONAL INJURIES AND AS A SPLITTING OF A CAUSE OF ACTION.

Medical expenses are an obvious element of a personal injury action. This principal is acknowledged in the cases cited below and is generally stated in 22 Am Jur 2d §102 page 149: "One of the principal elements of damages in a personal injury action is the value of medical expenses."

The first and most obvious objection to the defendant's alleged right of subrogation is that in the State of Utah and in most other states it is clearly the law that a cause of action for personal injuries is not assignable. In 40 ALR 2nd 502 numerous cases are cited espousing the common law rule which forbids the assignments of causes of action for personal injury. The Utah cases generally in agreement with the common law rule are *Fritz vs. Western Union Telegraph Company*, 25 Utah 263, 71 Pac. 209 (Dic-

tum, 1903); *Mayer vs. Rankin*, 91 Utah 193, 63 Pac. 2nd 611 (1936). The most recent pronouncement on this point is in the case of *In Re Behm's Estate*, 117 Utah 151, 213 Pac. 2nd 657, wherein the court held on page 662 in the Pacific Report that the cause of action for personal injury was not assignable. The court further held that the owner of the cause of action could assign the proceeds from the cause of action but that he would have to prosecute the action himself and could not transfer the ownership of the cause of action.

The rule of non-assignability of an action for personal injuries has extensive historical roots, which are still pertinent to the present scene. Numerous courts in recent years have faced the identical problem contained in this case and have reaffirmed the non-assignability of all or a portion of a personal injury claim. A case directly in point with the present action is that of *Harleysville Mutual Insurance Company vs. Lea*, 410 Pac. 2nd 495, Arizona (1966). In that case Harleysville Mutual issued an automobile insurance policy to Lea which contained medical expense coverage. Lea was involved in an accident resulting in bodily injury to himself. Harleysville paid to Lea the amount of $620.98 for medical expenses and Lea in turn signed a receipt and release in behalf of Harleysville subrogating it to Lea's claim against the tort feasor for medical expenses. Lea then subsequently entered into a settlement with the tort feasor and refused to reim-

burse Harleysville to the extent of the benefits paid by Harleysville under its medical provisions. Harleysville then brought a suit against Lea for the amount of the medical payments. At trial Lea moved to dismiss, which motion was granted. On appeal the Arizona Court of Appeals pointed out that whether or not the subrogation rights arose from the policy or from the receipt and release, the question was nevertheless whether or not Lea had the ability in law to assign in whole or in part his cause of action for personal injuries to Harleysville. Harleysville argued that the historical rule of non-assignability of personal injury actions had been abrogated in Arizona inasmuch as the Arizona legislature had recently passed a statute which provided for causes of action to survive except that on the death of the person injured the damages for pain and suffering of such person did not survive. That decision is directly in point with the present case inasmuch as respondent here claims that the recently enacted Utah statute, 78-11-12, Utah Code Annotated 1953, 1967 Pocket Supplement, has changed the rule in Utah in regards to the survivability of actions for medical and funeral expenses. That section is identical with the newly enacted Arizona statute which the Arizona court held to be irrelevant to the question of assignability of such causes of action. The court there held that it mattered not whether an action for personal injuries survived in whole or in part, the point being that it was against public

policy of the State of Arizona to allow the assignment of causes of action for personal injuries. The court indicated that unscrupulous people would purchase causes of action for personal injury and thereby traffic in personal injury lawsuits, which obviously is a very real possibility should said causes of action be assignable. The Arizona court then went on to point out that other states had also come to the same conclusion under similar facts using the basis of public policy as well as other reasons. The court referred to the California case of *Peller vs. Liberty Mutual Fire Insurance Company,* 34 Cal. Rep. 41 (1963). There an action for declaratory relief was brought by the insured against his own insurer alleging that the insurer would not make payment under the medical payments provisions of his policy unless he entered into a subrogation agreement and assigned the right or recovery in the personal injury action to the extent of the medical expense payment to the insurer. The trial court granted a judgment on the pleadings in favor of the plaintiff insured. On appeal the appellate court upheld the rule of non-assignability of a cause of action arising out of personal injuries. The insurer in that case attempted to label the subrogation as an indemnity; however, the court rejected this stating that the distinction was purely verbal in that the legal effect of the policy provisions is the same regardless of what term is attached to the procedure since the result is to transfer the insured's cause

of action against third-party tort feasor to the insurer. The court held that such right of subrogation could only come by the direct act of the California legislature and not by a court-made law. The court also referred to the cases of *Nielson Realty Corporation vs. Motor Vehicle Accident Indemnification Corporation*, 262 N.Y.S. 2nd 652 (1965); *Bethlehem Fabricators vs. H. D. Watts Company*, 190 N.E. 828(1934); and *Hereford vs. Meek*, 62 S.E. 2nd 740, West Virginia (1949). The court then referred to another recent case directly on point — *Travelers Indemnity Company vs. Chumbley*, 394 S.W. 2nd 418 (1965). There the insurer had sued its insured and the third-party tort feasor to recover the amount of medical payments which it had paid to its insured. The insurer's policy had the usual subrogation provision. The insurer had paid to the insured his claim for medical expenses and had given notice of said alleged subrogation right to the tort feasor. Subsequently the insured settled with the tort feasor. Both the defendants made motions to dismiss the action, which were on the basis that neither stated a cause of action. The lower court granted both motions. On appeal the court affirmed the dismissal as to both the insured and the tort feasor. In doing so the court held that Missouri followed the common law rule prohibiting the assignment of a cause of action for personal injuries and that such purported assignment of the right to recover the medical expenses was a violation of said rule. The court indi-

cated one objection to allowing subrogation on the medical payments would be that if it were so allowed all automobile insurers and other health and accident insurers would insist upon subrogation as to medical payments, thus resulting in multiple subrogation claims. The court said in that regard:

> ". . . And, so it seems to us, multiple subrogation claims inevitably would lead to conflicts and disputes between subrogation claimants, would complicate and make more difficult the negotiation of voluntary settlements with third-party tort feasors, and would encourage and promote suits in interpleaders, all running counter to the policy of the law."

The court felt it would be lifting the lid on a Pandora's box to allow subrogation of medical expenses to be an exception to the well-established rule of non-assignability. It is also interesting to note that in the *Chumbley* case the insurer argued that medical expenses should be treated as property damage. The court rejected this saying that the medical expenses arose directly from the bodily injury and were an integral element of the personal injury cause of action, and that such medical expenses stood on a much different footing than property damage and therefore was not assignable. The court said in that regard:

> ". . . Noting only in passing that the case at bar presents a novel and unique situation in which plaintiff not only would split the cause of action for personal injury by severing therefrom the claim for medical expenses

but also would fragment that claim by dividing it between the plaintiff and Chumbley, $500 to the former and the remainder to the latter."

In addition to the reasons given by the above cases, the Arizona court also put forth the following as a further basis for its holding:

". . . In the instant case we have a contract of insurance entered into prior to the accident providing for payments under the medical pay provision portion of the contract. The insured paid a premium for this policy and is entitled to the medical payment regardless of any further action he may take in bringing suit against the tort feasor. Should he recover after suit and trial, he will have to pay a portion of his recovery for attorneys' fees and costs, and expense which the appellant herein ignores in demanding the return of the full amount paid to the appellee. To require the insured to subrogate these funds or to assign the amount to the insurer, especially when there is no way of apportioning the amount in the whole of the judgment or settlement, it can only lead to further litigation, subterfuge and deceit."

Thus, it is quite obvious that the Arizona court took a long look at the problem, considering recent cases on the problem and relevant facets of public policy, and was correct in holding that there was no right of subrogation in the State of Arizona on the medical expenses.

One other very recent case which has dealt with this specific problem is *Forsthove vs. Hardware*

Dealers Mutual Fire Insurance Company, 416 S.W. 2nd 208, (1967 Mo. App.). In this case Forsthove was the tort feasor and Farm Bureau was his insurer, and Marks was the injured insured and Hardware Dealers his insurer. Marks' wife was injured in a collision with the Forsthove vehicle, from which she died. Hardware Dealers policy contained medical pay provisions similar to those in the present case, and pursuant to said provision paid to Marks $1,500 for medical and funeral expenses. After making said payment, Hardware Dealers demanded a written assignment and subrogation receipt. Subsequently, Marks settled with the tort feasor and its insurance company. Hardware Dealers had served notice upon the tort feasor and his insurer, Farm Bureau, of its subrogation rights. Farm Bureau not knowing to whom the money should be paid filed a bill of interpleader, and all were joined in the interpleader action. Marks claimed he was entitled to the entire settlement amount on the grounds that the purported assignment to his insurer was prohibited by law. Hardware Dealers claimed that the policy created an equitable assignment of Marks's claim for the medical expenses to the extent paid by Hardware Dealers. Hardware Dealers also made several alternative claims, one based on restitution and another for breach of contract. The court rejected all of Hardware Dealers contentions and affirmed the trial court's holding which had held that Marks was entitled to the full amount of the settle-

ment. The court agreed with the *Travelers Indemnity Company vs. Chumbley* case previously cited that the cause of action was not assignable due to public policy considerations to prevent barter and trade of personal injury actions by injured people and creditors. The court stated that whether or not the cause of action survived had no significance in determining whether the cause of action was assignable under that court's view of the problem. The court in denying the alternative basis for recovery in behalf of Hardware Dealers stated that to allow these claims would be to allow them to do indirectly what the court had just held they could not do directly. And as the Arizona court had mentioned in the *Harleysville Mutual* case, the court also noted that Marks had paid a premium for this policy and under the circumstances was entitled to the funeral expense payment regardless of what further action he might have taken in bringing suit against the tort feasors. The following are other rather recent cases which have also recognized the non-assignability of personal injury actions: *Putnam vs. Continental Air Transport Company*, 297 F. 2nd 501 (CA 7, Illinois); *Washington vs. Washington*, 302 Pac. 2nd 569, California; *Clar vs. Dayde County*, 116 South 2nd 34, Florida; *U.S. Fidelity & Guaranty Company vs. Reed Construction Company*, 132 South 2nd 626, Florida; *Remsen vs. Midway Liquors, Inc.*, 174 N.E. 2nd 7, Illinois; *Juba vs. General Builders Supply Corporation*, 194 N.Y.S. 2nd 503, 163 N.E.

2nd 328; *Crawford vs. O'Sullivan*, 189 N.Y.S. 2nd 724; and *Richmond vs. Hanes*, 122 S.E. 2nd 895, Virginia.

Plaintiff respectfully submits that the cases previously cited constitute the desirable result to be achieved in the present case. This Court has never strayed from the proposition that the causes of action for personal injury were not assignable. There is no reason to change that rule today. In fact, as was pointed out in the cases above, there are very compelling policy reasons for not allowing subrogation on medical expenses, the most important being: (1) the creation and encouragement of litigation and multiple claims, (2) the hindrance to the already difficult road to settlement of personal injury claims, (3) the barter and trade of personal injury actions, if the same were made assignable, (4) injured party has paid premiums for the coverage and should be allowed the benefits therefrom. Where a party has paid premiums on insurance, the Supreme Court of the State of Utah has confirmed he should be able to recover the amount due regardless of collateral sources. In the recent case of *Phillips vs. Bennett*, 439 Pac. 2nd 457, ... Utah 2nd ..... (1968), the Supreme Court affirmed the collateral source rule saying that the plaintiff was entitled to an instruction that insurance proceeds received by the plaintiff for medical expenses, the premiums of which were not paid by the defendant, could not be used to reduce the judgment for medical specials

against tort feasor. The same policy should hold in the present situation in that if a person has paid premiums for medical coverage, the insurer should not be able to defeat that payment under said coverage by inserting in the policy a subrogation clause in violation of the rule of non-assignability and clearly against the public interest of the State of Utah.

POINT II.

THE COURT ERRED IN FINDING THAT PLAINTIFF STATE FARM HAD GIVEN ADEQUATE NOTICE TO DEFENDANT FARMERS OF ITS SUBROGATION INTEREST PRIOR TO DEFENDANT'S SETTLEMENT WITH THE INSURED SESSIONS.

The present point, of course, becomes pertinent only if the Court should find that the plaintiff has a right to subrogation. In such event, defendant contends that the letter of August 4 (Exhibit D-2) was as a matter of law insufficient to constitute notice of State Farm's subrogation rights, and that a question of fact was created as to whether Farmers had, by August 9, acquired sufficient notice. Defendant respectfully contends that on such grounds the summary judgment in plaintiff's favor was improper.

To clarify the record as to the notice issue, it should first be noted that the letter in the record (R. 54) from appellant's counsel to Judge D. Frank Wilkins who was considering defendant's motion

for dismissal wherein counsel indicates there was no issue as to notice was not intended nor treated by the parties as a waiver of that issue. At that time the issue before Judge Wilkins on the motion to dismiss was whether or not a right of subrogation existed and thus whether a cause of action would lie. In addition, when said letter was sent the contents of the August 4 letter were not known to appellant's counsel. At the hearing of plaintiff's motion for summary judgment, the contents of the August 4 letter were known to counsel who there raised the notice issue without objection from respondent, and said issue was argued to and considered by the court.

It has been unanimously recognized in property damage cases in the absence of fraud or collusion that no subrogation rights arise when payment is made by the subrogee insurer after its insured had settled with a tort feasor. *Phillips vs. Worthen*, 251 S.W. 2nd 118, Arkansas (1952); *Tyre vs. Andrus*, 104 A. 2nd 775, Delaware (1954); *New York Underwriters Insurance Company vs. Louisville and N.R. Company*, 148 S.W. 2nd 710 Kentucky (1941); *Cleveland vs. Chesapeake and Potomas Telephone Company*, 169 A. 2nd 446, Maryland (1961, recognizing the rule); *Motorist Mutual Insurance Company vs. Gerson*, 177 N.E. 2nd 790, Ohio (1960, recognizing the rule); *Service Fire Insurance Company vs. Nicosia*, 38 Del. Co. 200 (1951); *Calvert Fire Insurance Company vs. James*, 114 S.E. 2nd

832, South Carolina (1960); *Gulf Insurance Company vs. White*, 242 S.W. 2nd 663, Texas (1951); and see the notation in 92 ALR 2nd 112. That same reasoning clearly applies to situations where the payment was made prior to the settlement with the tort feasor but where notice of such subrogation rights were not given until after said settlement had been effected.

Some courts have gone one step further and have held that in order to be effective the notice must state that payment has been made, and mere allegation that a claim was being made against the subrogee was not sufficient notice to raise a subrogation right. In the case of *Allstate Insurance Company vs. Dye*, 170 N.E. 2nd 862, Ohio (1960), the subrogee insurance company gave notice that a claim had been made under its policy, but such notice did not state that payment had been made nor a subrogation receipt executed; and the court held that such notice was defective and the tort feasor was not liable to the insurance company. In *Service Fire Insurance Company vs. Nicosia*, 38 Del. Co. 200, Pennsylvania (1951), the tort feasor admitted notice had been given but contended that the notice was insufficient inasmuch as it did not state that payment had been made by the subrogee. The court held that such notice was insufficient and that subrogation rights did not arise until notice of payment. Although there are a few cases on this subject, the above cases appear to reflect the rule

to be applied in judging the effectiveness of subrogation notice. In the present case the letter of August 4, 1967, is wholly deficient as notice in that it fails to state that payment has been made, and in fact affirmatively states that it has not been called upon to make payment, and in addition characterizes plaintiff's interest as only "possible interest." The letter merely speaks of a possible subrogation, and thus if viewed in light of the above cited cases the notice is obviously deficient. Appellant urges this Court to apply the criteria above set forth to the present case and find the letter of August 4 was insufficient notice.

With the letter of August 4 failing as notice, the question then arises as to whether defendant Farmers did, prior to August 9, have notice of the August 4 payments. No evidence was available at the summary judgment hearing upon which to decide that issue. The defendants there suggested that such issue should be resolved before a summary judgment against the defendant would be proper; however, the court proceeded to rule on the notice without further evidence. As the evidence stands now, the notice was insufficient and thus it would be incumbent upon the plaintiff to produce evidence of knowledge by defendant prior to August 9 in order to raise a right of subrogation, if in fact one so exists. The notice issue being very material should have been thoroughly examined by the finder of fact before judgment against defendant could be justified. On this basis, defendant claims error.

SUMMARY

Defendant respectfully submits that to allow the plaintiff to subrogate on medical expenses would merely open up a new Pandora's box with the resulting multiplication of suits, the juggling around of all of the medical expense carriers trying to become secondary rather than primary, the trafficking of such causes of action, and other previously mentioned undesirable social results. In addition such subrogation is in fact the splitting of a cause of action for personal injuries and constitutes an illegal asignment of the same. Although there may be some advantages to the insurance companies in allowing said subrogation, the disadvantages greatly outweigh the advantages. Defendant thus prays that the Court rule as a matter of law that there is no right of subrogation for medical expenses in the State of Utah and that the summary judgment granted to the plaintiff by the lower court be reversed and the case dismissed. If this Court should, however, find there is a right of subrogation, defendant submits that the court erred in ruling as a matter of law on the issue of notice inasmuch as the letter of August 4 was insufficient to raise the right of subrogation and until the plaintiff could prove by further evidence that there was actual notice, the court erred in granting judgment against the defendant.

Respectfully submitted,
HANSON & GARRETT
520 Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorneys for Appellant